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IN THE

Supreme Court of the United States

October Term, 1974.

No. 74-1546.

HAROLD FINKLE,

Petitioner,

v.

STATE OF NEW JERSEY,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of New Jersey.

REPLY BRIEF OF PETITIONER.

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PETITIONER'S REPLY TO RESPONDENT'S BRIEF

Because Respondent's brief makes some seriously false statements and misleading implications we are obliged to refute and comment. To assist the Court in discerning the State's inaccurate conclusions as to the trial proceedings, we have lodged with the Clerk of the Court a copy of the Trial Transcript which is part of the Record below.

For example, at **Rb2**, the State says that the Magistrate "took judicial notice." That is absolutely untrue. The following colloquy took place at page 3 of the Transcript:

> "MR. FINKLE: May I ask your Honor the basis on which the court takes judicial notice of the accuracy of Vascar.
>
> THE COURT: Of the accuracy of Vascar?
>
> MR. FINKLE: I assume you are taking judicial notice of the accuracy.
>
> THE COURT: Well, I don't know whether you can characterize it as taking judicial notice. I had had the occasion to be instructed in the operation of Vascar by the New Jersey State Police at the Port Norris Barracks. I have had occasion to—
>
> MR. FINKLE: Is your Honor testifying as an expert?
>
> THE COURT: No, I am telling you my basis for the permitting the introduction of testimony of Vascar. I have had demonstrations of Vascar. . . ."

Again at **Rb2** the State says that Petitioner "admitted he had been speeding." That is false. The exact testimony was, at page 46 of the Transcript:

> "When the tropper stopped me, I said—and he told me that I had been going 75 miles an hour, I said to him, "that you must be out of your mind. If you had said to me I was going 60 miles an hour I would believe you, but to tell me I was going 75 miles an hour in this traffic," I said, "you have to be crazy." He said, "well, it is on my Vascar unit." I told him, "I don't care about your Vascar unit. I can't be going 75 miles an hour."

Neither the Magistrate, the County Court nor the Appellate Division held this to be an admission of guilt. When this was referred to at oral argument in the Supreme Court of New Jersey, the Justices recognized it for exactly what it was—an argumentative, conjectural statement; not an admission of guilt.

At **Rb4** the Attorney General of New Jersey is deliberately misleading this Court when he says that the State "provided . . . numerous, published studies on Vascar." He knows very well that this was not "published" material as that word is generally understood and as defined in every dictionary; and that it had not theretofore been publicly disseminated or submitted to any court. (See our footnote #6, page 9 of the Petition).

At **Rb5 line 5**, the reference to New Jersey Evidence Rule 12 is again a false implication. The Appellate Division did not even refer to nor base its decision upon Rule 12, which is precisely the point of our contention of error.

RESPONDENT'S ARGUMENT

The thrust of Respondent's argument for denying the Petition seems to be that the Petitioner had "proper notice" that the charge was based upon Vascar, ergo he had "full opportunity" to dispute the merits (or more particularly the "reliability and accuracy") of Vascar, and "failed to establish that it is unreliable". It is difficult to understand such distorted reasoning in the context of a criminal case with its burden-of-proof requirement. Furthermore, the Attorney General knows very well (as we have shown below) that there is not even any discussion of Vascar in any scientfic or engineering or technical journal, manual or other published reference book. Which brings attention to the preposterous statement at **Rb11 line 18** that "this information exemplified the scientific community's uniformity of opinion." We wonder that the Attorney General feels no embarrassment in calling this collection of obscurity—"*the scientific community*".

This, itself, emphasizes the need for confrontation. The denial of this constitutional right would allow a conviction to stand on unauthenticated materials allegedly authored by persons whose credentials are unverified and untested. We submit that it is presumptuous and deliberately misleading to even list these papers in Respondent's Table of Contents under the heading of "Other Authorities Cited". And the Respondent says that *our* view is "parochial" because we cannot find these papers "on a library shelf".

At **Rb12,** middle of last paragraph, there is a blatant falsehood. The Attorney General says ". . . respondent obtained affidavits from the various authors. . .". *These were not affidavits;* they were the "questionnaire" described on page 13 of the Petition. They were not even signed. We are amazed at this continuing reckless insen-

sitivity. It typifies the desperation, evident throughout this case, to achieve judicial-notice recognition for this speed-meter device regardless of propriety.

The rest of **Rb12** and the first paragraph on 13 are simply begging the question on the basic point that this dubious material, together with the other papers submitted to the Appellate Division, were an improper basis for *judicial notice by an Appellate Court.* The Attorney General persists in referring indiscriminately to Evidence Rules 10 and 12 without making any distinction, and fails to meet our contention that the Appellate Division *improperly* invoked Rule 10, that it made no mention whatsoever of Rule 12, and if it, or the Supreme Court, did rely on Rule 12 (and there is no such indication) then the decisions are certainly in error because the *"any source"* provision in Rule 10 is purposefully omitted from Rule 12.

The Attorney General still fails to perceive that the issue in this case is *not* the merits of Vascar. The real issue is the manner in which the Law and Rules of Evidence have been applied to this defendant in this case—Due Process and Confrontation.

With respect to the *Ex Post Facto* question, the Respondent's references are not entirely in point, and certainly not in accord with a philosophy of the law that has only gained recognition in recent years. That embraces the theory of "judicial legislation" espoused (among others) by the Honorable Joseph Weintraub, former Chief Justice of New Jersey Supreme Court, in *Judicial Legislation,* 81 N. J. L. J. 545 (1958); and the theory of judicial notice which distinguishes between "adjudicative facts" and "legislative facts." The former is too controversial and not relevant for discussion at this point; but the latter (so ably expounded in the extensive writings of Professor Kenneth Culp Davis and others) is a universally established

concept. In recognition, the Federal Rules of Evidence restrict judicial notice to "adjudicative facts" (Rule 201(a)).

Therefore when a state court now purports to take judicial notice of a "legislative fact" it is exercising a legislative function. In this case it was the Appellate Division which first did so. The error was in its "retrospective operation", which is the phrase used in *Calder v. Bull*, 3 Dall. 386, 390. And our contention is not inconsistent with Justice Chase's definition:

> "I will state what laws I consider ex post facto laws, within the words and the intent of the prohibition. * * * * 4th. Every law that alters the legal rules of evidence, *and receives less, or different testimony, than the law required at the time of the commission of the offence*, in order to convict the offender." (emphasis added).

Respectfully submitted,

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